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No. 471

FILED
OCT 11 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1959

STATE BOARD OF EDUCATION,
ARCH W. FORD, Commissioner of
Education, ... Appellants,

vs.

JOHN AARON, et al., ... Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

STATEMENT OF APPELLANTS, STATE BOARD OF EDUCATION AND ARCH W. FORD, COMMISSIONER OF EDUCATION OF ARKANSAS, AS TO JURISDICTION

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SUPREME COURT OF THE UNITED STATES

October Term, 1959

STATE BOARD OF EDUCATION and ARCH W. FORD, Commissioner of Education----------Appellants

vs.

JOHN AARON, ET AL----------Appellees

STATEMENT AS TO JURISDICTION

This appeal is from the decision of the United States District Court, Eastern District of Arkansas, Western Division, entered on June 18, 1959, holding Act 5, Ark. Acts of 1958 (2nd Ex. Sess.), as amended, unconstitutional and permanently enjoining these appellants from engaging in any acts which would directly or indirectly impede, thwart, delay or frustrate the execution of the approved plan for the gradual integration of the schools of the Little Rock School District. This statement is presented to show that the lower court erred in its decision.

OPINION BELOW

The District Court, on June 18, 1959, delivered its decision upon the issues raised by the supplemental complaint and the answers thereto. The opinion is reported at 173 F. Supp. 944 and appears in the appendix hereto at page 1a.

JURISDICTION

This action, another phase of *Aaron* v. *Cooper*, 261 F. 2d 97, and *Cooper* v. *Aaron*, 358 U. S. 1, was begun by plaintiffs filing a supplemental complaint pursuant to 28

U.S.C.A. §§2281, 2284, 2201 and 2202. The supplemental complaint alleged the unconstitutionality of Act 4, and Act 5 as amended by Act 151, Ark. Acts of 1959, and sought declaratory and injunctive relief. The jurisdiction of this Court to review by direct appeal the action of a three-judge court rests upon 28 U.S.C.A. §§1253 and 2201 (b). An appeal to the Supreme Court of the United States from the decision of a three-judge court is a matter of right. *Radio Corporation of America* v. *United States*, 95 F. Supp. 660, Affirmed 341 U.S. 412. Judgments of three-judge courts are properly appealable directly to the Supreme Court of the United States. *St. John* v. *Wisconsin Employment Relations Board*, 340 U. S. 411.

STATUTES INVOLVED

Act 5, Ark. Acts of 1958 (2nd Ex. Sess.), as amended by Acts 151 and 466, Ark. Acts of 1959, is set out in the appendix hereto at pages 17a through 24a. At the time of the hearing on May 4, 1959, the provisions of Act 466, supra, were not in effect. Act 466 was approved without an emergency clause on March 31, 1959, but did not become effective until 90 days after the Legislature adjourned. Hence, the effective date of the Act was June 11, 1959, Ark. Const., Amend. 7. While Act 466 was in effect shortly before the decision of the lower court, it apparently was not considered. Thus, the situation presented here is similar to a case where there has been legislation enacted after the decree of a lower court, and the effect of Act 466 should be considered by this Court. See *Texas Company* v. *Brown*, 258 U.S. 466; *Fines* v. *Davidowitz*, 312 U.S. 331. Hereafter in this brief, a reference to Act 5, as amended, refers to the Act, as amended by Acts 151 and 466, Ark. Acts of 1959.

Act 5, as amended, authorizes the withholding of State funds from schools where: (a) such schools have

been closed by order of the Governor under the provisions of Act 4, Ark. Acts of 1958 (2nd Ex. Sess.); or (b) whenever a student should be accepted for enrollment in a school other than the one which he normally would attend; and authorizes pro rata payments of State funds to other districts only under the condition set forth in (a) above.

QUESTIONS PRESENTED

The questions presented by this appeal are whether the lower court was correct in holding Act 5, as amended, unconstitutional because it was complementary to and dependent upon Act 4 and that funds withheld from a school district were allocable to that school district on a constitutional basis, and whether the court was correct in permanently enjoining these appellants from applying the provisions of Act 5, as amended.

STATEMENT OF THE CASE

The Arkansas State Board of Education and Arch W. Ford, Commissioner of Education of Arkansas, were made parties defendant in the supplemental complaint filed on January 17, 1959. The plaintiffs sought temporary and permanent injunctive relief from the provisions of Act 5, as amended, and also asked the court to declare whether Act 5 denied plaintiffs and those similarly situated of rights guaranteed them by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. These appellants answered alleging that the complaint failed to state a claim against them for which relief could be granted and denied the material allegations of the complaint. The provisions of Act 5, as originally enacted, had been previously put into effect and some funds withheld from the Little Rock School District and paid to other districts where former students of Little Rock schools were in at

tendance. Act 5, as amended, merely authorizes the State Board of Education to withhold State funds from schools which have been closed by the Governor under Act 4, supra, or where a student has transferred from one school to another. Before Act 466 amended Act 5, as amended by Act 151, these withheld funds could be paid to another district which had accepted a student under either of the foregoing situations. After Act 466 became effective, the funds could be withheld as before but could not be paid to another district except where a school had been closed by the order of the Governor, and any unexpended surplus had to be returned to the district at the end of the school year. The District Court simply held that Act 5, as amended by Act 151, was invalid because it was dependent upon Act 4. As stated heretofore, the effect of Act 466 was not considered; and when the effect of the Act is considered, it is clear that the opinion of the District Court was in error. On the face of the Act as it now stands, it is obvious that Act 5, as amended, is not completely dependent upon the provisions of Act 4.

The substantial questions that arise here thus address themselves to the Court's decision. Can a federal court render wholly unconstitutional an act which, while dependent in one phase on an act held unconstitutional, has an application and operation purely local in its nature? Aside from the provisions of Act 466, is partial or even complete dependency of operation on an alleged unconstitutional act sufficient grounds to invalidate the dependent act? A second and more serious question is whether a school district has any right to funds gratuitously paid to it by a state which is protected by the Federal Constitution. This latter question arises out of the Court's holding that Act 5 "did not, and does not, authorize the State Board of Education to deprive the Little Rock School District of State funds allocable to it for the maintenance

of its schools on a constitutional basis, or to divert any part of those funds to other schools or other districts." Bearing in mind that the District Court did not say that the particular application of Act 5 deprived these plaintiffs and others similarly situated of their share of funds normally allocable to them by the State, can it be said that the Little Rock School District is constitutionally entitled to any State funds? The State questions on State constitutional requirements had been precluded by the holding of the Arkansas Supreme Court in *Fitzhugh v. Ford, Commissioner*, Ark. Law Rep., Vol. 105, Opinions delivered May 4, 1959. Therefore, the question posed by the holding is indeed substantial since it invades an area heretofore regulated and controlled by the states which support their schools with state funds.

If this Court should wish to assume for purposes of this statement that Act 4 is unconstitutional, such assumption would not change appellant's argument nor will it sustain the District Court's ruling. It is true a part of the operation of Act 5, as amended by Act 151, does hinge on the validity of Act 4, but the most that can be argued on this point would be the mootness of Act 5. Obviously, there is an application of Act 5 having no relation to Act 4, and the validity or even the existence of Act 4 is immaterial. The application is obvious on the face of the Act. Simply stated it is this: When a student leaves the school he would normally attend, his share of State funds is withheld from the district he leaves. When the school year is over, the funds are returned to the district. This procedure deprives no student or school or agency of anything. The district is merely temporarily deprived of funds for a student or students it is not educating. It cannot be argued that this result was not the intention of the Legislature. The Act as it now stands speaks for itself and as to this point no court has held that the per

sonal preference of individual students as to the school they would not attend could be exercised in such a manner as to deprive other students of constitutional rights. This is not a case of an attempt to frustrate or thwart the desegregation of a public school by State action. The decision of one or all of the white or colored students not to attend an integrated school does not or would not change its integrated nature in law, nor can it be said that Act 5, as amended, assists these students to attend other schools since funds may not be paid to other districts under Section 3 (Act 466, Ark. Acts of 1959) for these transferring students.

It is earnestly insisted by these appellants that the District Court erred in its holding and abused its discretion in granting the injunction prayed since there was absolutely no showing that appellees would suffer any injury or be deprived of any right by the operation of Act 5 or either of its amendments, and certainly not by Act 5 in its present form. Appellants recognize that a constitutional law may be applied in an unconstitutional manner, but this is not the question before the Court. The action was brought alleging personal deprivations of rights. The relief was granted on the basis of rights belonging to a school district and a theory of unconstitutionality by association.

If the District Court's broad holding is allowed to stand, it will jeopardize a whole segment of school laws, not only in Arkansas, but in many states that provide gratuitous aid to schools and which have many laws of long standing regulating the amount, the manner and other details of state aid.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the lower court be reversed.

Respectfully submitted,

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APPENDIX

DECISION
of
THE DISTRICT COURT

Opinion Delivered June 18, 1959

Civil Action No. 3113

JOHN AARON, ET AL. — *Plaintiffs*

v.

ED L. MCKINLEY, ET AL. — *Defendants*

PER CURIAM.

This case was tried and argued to this statutory three-judge court on May 4, 1959, upon the issues raised by the supplemental complaint of the plaintiffs and the answers of the defendants. The action is a class action brought by school-age children of the Negro race and their parents and guardians, all residents of Little Rock, Arkansas. Declaratory and injunctive relief is sought against the defendants, State officers of the State of Arkansas, upon the claim that Act No. 4 of the Second Extraordinary Session of the Sixty-first General Assembly, 1958, of that State, pursuant to which the Governor on September 12, 1958, closed the four senior public high schools of Little Rock, both Negro and white, is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that Act No. 5 of the same Session, as later amended, by virtue of which state funds allocable to the Little Rock School District for the maintenance and operation of its

public schools have been withheld from the District and diverted to other schools, is likewise unconstitutional and void.

The defendants are the Governor of Arkansas, the State Commissioner of Education, the members of the State Board of Education, the Superintendent of the Little Rock Public Schools, the members of the Board of Directors of the Little Rock School District, and other State officers asserted to have a relation to the case.

In their supplemental complaint, the plaintifs allege:

"Acts No. 4 and 5, as amended by Act 151 of the Arkansas Acts of 1959, are part of a studied plan devised by the Governor and General Assembly of Arkansas to preserve racial segragation in the public schools and thus evade or frustrate compliance with the decision of the Supreme Court of the United States in the *School Segregation Cases* and, more specifically, the decrees of this Court, the Court of Appeals and the Supreme Court in the instant case. Each order of the federal courts to implement the constitutional rights of plaintiffs and others similarly situated to an unsegregated education has been met by action of the legislative and executive departments of Arkansas designed to nullify those orders. (Report of the Governor's Committee to Make Recommendations for Official Action, February 24, 1956; Constitutional Amendment No. 44 to the Constitution of Arkansas, adopted Nov. 6, 1956; Arkansas Statutes 1947, §§6-801 to 6-824; Arkansas Statutes 1947, §§80-1519 to 80-1525, Acts No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 of the General Assembly of Arkansas, 2nd Extraordinary Session 1958, approved September 12, 1958.)

"The State of Arkansas has undertaken as a state function to provide a system of free public schools for the education for all persons between the

ages of six and twenty-one years. Arkansas Constitution Article 14, §1.

"Acts No. 4 and 5 as amended by Act No. 151 of the Arkansas Acts of 1959, in authorizing the closing of the public high schools of the Little Rock School District, the withholding of funds from them because they were in the process of being desegregated pursuant to Court order, and the payment of said funds to 'non-profit private' schools which enroll pupils who formerly attended the schools now closed, is designed to nullify the orders of this Court and to condition the maintenance of public schools upon their operation in an unconstitutional manner and upon the waiver by plaintiffs of rights secured to them by the Constitution of the United States, all in violation of rights, privileges and immunities guaranteed to plaintiffs by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs ask this Court to declare Act No. 4 and Act No. 5, as amended, unconstitutional; to enjoin the defendants and those in concert with them from enforcing or seeking to enforce the Acts in question; to enter a judgment ordering that the public schools in Little Rock be opened, operated and maintained on a nonsegregated basis in accordance with the previous orders of the United States Courts in that regard; and to enjoin the defendants from further acts to prevent the carrying out of such federal court orders.

The complete history of this controversy from its inception to September 12, 1958, has been stated by the Supreme Court of the United States in its opinion in *Cooper* v. *Aaron*, 358 U.S. 1, unanimously affirming the United States Court of Appeals for the Eighth Circuit in reversing an order of the United States District Court

suspending the approved plan of gradual integration for the period of two and one half years.

The Supreme Court had on September 12, 1958, in that case, entered an order reading as follows (page 5 of 358 U.S.):

> "It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, 257 F.2d 33, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, 163 F.Supp. 13, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, see 143 F.Supp. 855, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.
>
> "The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

Upon the entry of that order, the Little Rock School Board and the Superintendent of Schools were again under mandate to carry out the approved plan of integration of the schools of Little Rock.

The further history of this litigation and its factual background is to be found in the opinion of the Court of Appeals for the Eighth Circuit, of November 10, 1958, in *Aaron v. Cooper*, 261 F.2d 97. That court points out that after its opinion of August 18, 1958 (257 F.2d 33), holding to be legally unwarranted the 2½-year suspension of the approved plan of integration granted by the District Court in 163 F.Supp. 13, the Governor of Arkansas called

the General Assembly into extraordinary session; that on August 26, 1958, it passed, with emergency clauses, the two Acts in question, which, however, were not signed by the Governor until September 12, 1958, the day the Supreme Court of the United States entered its order in *Cooper v. Aaron*, affirming the decision of the Court of Appeals for the Eighth Circuit, 257 F.2d 33; that on the same day, acting under the authority purported conferred upon him by Act No. 4, the Governor issued a proclamation closing all of the senior high schools of Little Rock, and called for an election in the School District, to vote on the alternative ballot proposition of "For Racial Integration of All Schools Within the School District" or "Against Racial Integration of All Schools Within the School District"; that Act No. 4 provided that, unless a majority of the qualified electors of the District voted in favor of integration, "no school within the district shall be integrated", and that a school closed by executive order authorized by the Act "shall remain closed until such executive order is countermanded by proclamation of the Governor"; and that the vote at the election was about 19,000 against, and 7,500 for, racial integration of all schools in the Little Rock School District (page 101 of 261 F.2d)

Speaking of Act No. 5, the Court of Appeals said on page 99 of 261 F.2d:

> "Act No. 5 was complementary to Act No. 4, in its provisions for withholding from a school district, in which the Governor had ordered a school closed, a pro rata share of the State funds otherwise allocable from the County General School Fund, and making such withheld funds available, on a per capita basis, to any other public school or any non-profit private school accredited by the State Board of Education (of which the Governor was a member), which should be attended by students of a closed

school, with an obligation being imposed upon the State Board of Education in these circumstances to make such payments. §§2 and 3."

While the Court of Appeals expressed no opinion with respect to the constitutionality of Acts No. 4 and 5, it ruled that the Little Rock School Board, which was under mandate of the federal District Court to effectuate the plan for the gradual integration of the public schools of Little Rock approved by that Court in *Aaron* v. *Cooper*, 143 F.Supp. 855 (aff'd in *Aaron* v. *Cooper*, 243 F.2d 361), could not lease the high school buildings of the District to a Private School Corporation for the operation of schools on a segregated basis, nor could the School Board otherwise disable itself from carrying out the court approved plan of integration.

The District Court was directed by the Court of Appeals to enjoin the School Board, its members, and their successors, from transferring the high schools or other property of the District for the carrying on of any segregated school operations of any nature and to provide that the Board and its members and their successors "shall take such affirmative steps as the District Court may hereafter direct, to facilitate and accomplish the integration of the Little Rock School District in accordance with the Court's prior orders" (page 108 of 261 F.2d).

The Supreme Court of Arkansas on April 27, 1959, by a four-to-three majority, in the case of *Garner* v. *Faubus, Governor, et al.*, Ark. , 323 S.W. 2d 877, held that Act No. 4 did not conflict with any provision of the Constitution of the State of Arkansas or with the Constitution of the United States. Justice Ward wrote the opinion of the Court. Justice Robinson and Chief Justice Harris each wrote a concurring opinion.

The four justices of that Court who believed that the Act was valid both under the Constitution of Arkansas and the Constitution of the United States were of the view that the Act represented a reasonable and proper exercise of the police power of the State to meet a temporary emergency, and to quote from the opinion of Justice Ward "to protect the peace and welfare of the people, and to effect a workable solution of this momentous problem [integration of the schools] all within the framework of the *Brown* opinion [*Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294]."

Justice Robinson, in his concurring opinion, had this to say (page 892 of 323 S.W.2d):

> "* * * In order to prevent violence that would be brought about by sending the Negro children to White schools, and to prevent the use of armed troops in the school buildings and on the school grounds, the Legislature authorized the Governor to close the school affected. But, undoubtedly, the General Assembly felt that if a majority of the voters, including Negro voters (who constitute a large percentage of the total electors in Little Rock), felt that the schools should be opened, then the schools could be conducted without the use of troops and United States Marshals. Act No. 4, therefore, provides for an election to determine if the people wanted the schools opened. Such an election was held, and the vote was overwhelming in favor of keeping the schools closed." [*]

Chief Justice Harris was also of the view that Act No. 4 [illegible] the police power. The

[illegible]

[*] It is to be noted that the only choice given voters under Act No. 4 was to vote either for or against "Racial Integration of All Schools * * *," and not upon the question of having the schools open or closed

State to meet a situation "sufficiently inimical to the public safety and welfare to justify the legislation * * * ".

Justice McFaddin, in his dissenting opinion, expressed the view that Act No. 4 was violative of Section 1 of Article 14 of the State Constitution providing that " * * * the State shall ever maintain a general, suitable and efficient system of free public schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction", and opposed to decisions of the Arkansas Supreme Court construing that provision of the Arkansas Constitution.

Among other things, Justice McFaddin said (page 900 of 323 S.W.2d):

> "* * * If the People of Arkansas want to strike Art. 14 from the Constitution, then the schools may be closed under some legislation similar to Act No. 4. But until Art. 14 of the Constitution is repealed, then it is my solemn and sincere view that Act No. 4 is violative of the Arkansas Constitution."

He expressed the view that the police power of a state may not be used to invade or impair the liberty of citizens guaranteed by the State Constitution, and said: "In short, the Arkansas Legislature cannot under the guise of the police power, enact legislation contrary to the Arkansas Constitution." He stated that the situation with which the Court was dealing was not the kind of an emergency that permits the use of "Emergency Police Powers," and further said, in that regard: "Rather, we are dealing with a condition that has already existed since 1954 and will continue to exist until either the United States Constitution is amended or the United States Supreme Court overrules *Brown* v. *Board of Education*."

Apparently, all of the State Justices were agreed that Section 1 of Article 14 of the Constitution of Arkansas

requires the continued maintenance by the State of free public schools. In Justice Ward's opinion, in which Justice Robinson and Chief Justice Harris concurred, it is said (pages 880-881 of 323 S.W.2d):

> "* * * If Act 4 is viewed as giving the Governor the power to close all public schools permanently, it would, we concede, be in violation not only of the decree in the *Brown* case [*Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294] but also of the State Constitution, but we do not consider it that way. * * * we take it as well understood that the Act was intended to slow down the implementation of integration until it could be accomplished without great discomfort and danger to the people affected or until a lawful way could be devised to escape it entirely. * * *"

As we read the opinion of the Supreme Court of the United States in *Cooper* v. *Aaron*, 358 U.S. 1, it, in effect, holds that no lawless violation or threat, fear or anticipation of such violence, resulting from hostility to the integration of its schools, can justify any State, under the guise of the exercise of its police power, in depriving citizens, either temporarily or permanently, of rights guaranteed them by the Constitution of the United States.

The Court said (pages 16-17 of 358 U.S.):

> "The constitutional rights of respondents [Aaron, et al.] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by

the Federal Constitution.' *Buchanan* v. *Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex parte Virginia*, 100 U.S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives*, 100 U.S. 313; *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230; *Shelley* v. *Kraemer*, 334 U.S. 1; or whatever the guise in which it is taken, see *Derrington* v. *Plummer*, 240 F.2d 922; *Department of Conservation and Development* v. *Tate*, 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can

neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U.S. 128, 132."

Mr. Justice Frankfurter, in his concurring opinion, said (pages 21-22 of 358 U.S.):

"The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

"We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the Board of Education had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. * * *"

See, also *Faubus v. United States*, 8 Cir., 254 F.2d 797, 807.

The deplorable conditions which were found by the Honorable Harry J. Lemley, United States District Judge, to have existed at Little Rock Central High School during the 1957-58 school year, when nine Negro students were enrolled in the formerly all-white school attended by about 2,000 pupils, and which he honestly and sincerely believed justified granting a 2½-year moratorium to the School Board in the carrying out of its plan of integration (163 F.Supp. 13), were held insufficient to support his order both by the Court of Appeals (257 F.2d 33) and by the Supreme Court of the United States (358 U.S. 1). If the factual situation as found by Judge Lemley, whose fact findings have never been questioned, were insufficient to sustain his order, we can see no basis whatever for a ruling by us that Act No. 4 constitutes a valid and reasonable exercise of the police power of Arkansas to meet an emergency.

> "* * * Every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." *Plessy* v. *Ferguson*, 163 U.S. 537, 550. See and compare, *Yick Wo* v. *Hopkins*, 118 U.S. 356.

With all due respect to the considered views of those Justices of the Supreme Court of Arkansas who concluded that Act No. 4 represented a valid exercise of the police power of the State and therefore did not violate the Fourteenth Amendment to the Constitution of the United States, we are firmly of the opinion that Act No. 4 cannot be sustained upon that ground, and is clearly unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment, and conferred no authority upon the Governor to close the public high schools in Little Rock.

The Supreme Court of Arkansas, in the case of *Fitzhugh v. Ford, Commissioner*, ___ Ark. ___, 323 S.W.2d 559, in a unanimous opinion filed on May 4, 1959, held that Act No. 5 violates no part of the Constitution of the State of Arkansas, but did not consider whether it violated any part of the Constitution of the United States. The Court said (page 560 of 323 S.W.2d):

> "In essence, Act 5 provides: (a) It requires the Commissioner of Education to withhold certain *State Funds* (otherwise allocable to a school district wherein a school has been closed under said Act 4) in an amount calculated on a certain pro rata basis, the correctness of which is not challenged. It requires the Commissioner of Education to pay over to other *public schools* or *non-profit private schools* accredited by the State Board of Education from the funds so withheld an amount calculated on a pro rata basis according to the number of students from the closed schools) attending a recipient school. Simply and briefly stated, Act 5 provides that the money which normally would be spent on a student in a closed school would be paid to the school which he might later attend."

Since Act No. 5 is complementary to and dependent upon Act No. 4, and that Act is invalid, it follows that Act No. 5 is also invalid and completely ineffectual. We are satisfied that Act No. 5, as amended, cannot stand alone and did not, and does not, authorize the State Board of Education to deprive the Little Rock School District of State funds allocable to it for the maintenance of its schools on a constitutional basis, or to divert any part of those funds to other schools or other districts."

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* Sections 2 and 3 of Act No. 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of Arkansas, approved September 12, 1958, as amended by Act No. 151 of the General Assembly for the year 1959, approved March 3, 1959, read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall

There is no dispute as to the facts. The Little Rock public high schools were closed by the Governor, under Act No. 4, on September 12, 1958, before they were opened for the admission of students, and have remained closed ever since. The School Board has been precluded, by the closing of the public high schools, from carrying out its approved plan of gradual integration ordered into effect by the federal courts.

By virtue of Acts No. 4 and No. 5, as amended, $350,586.00 in funds allocable to the Little Rock School District had been withheld up to May 4, 1959. The total amount which will be withheld by the end of the 1958-59 school year, if these Acts remain in effect, will be slightly in excess of $510,000. Of the funds withheld, $187,768.00 has been paid to other schools, public and private, in accordance with Act No. 5. Of this amount, $71,907.50 was paid to the private Raney High School.

The total number of prospective high school students registered for the four high schools in Little Rock as of September, 1958, was 3,665. Of these, after the closing of the high schools by the Governor, 266 white students and 376 Negro students did not attend any school; the remainder transferred to private schools in Little Rock and to public and private schools within or without the State. The evidence shows where the white students went and where the Negro students went, but we find it unnecessary to go into that detail.

The purpose, effect, and results of the enactment and

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have been countermanded by the Governor, or whenever any person of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which any such

enforcement of Acts No. 4 and No. 5 are too obvious to require further discussion.

It is the judgment and declaration of this Court: that Act No. 4 of the Second Extraordinary Session of the General Assembly of Arkansas, 1958, is unconstitutional and invalid; that the proclamation of the Governor of Arkansas closing the public high schools in Little Rock was and is void; that Act No. 5, as amended, as a device for depriving the Little Rock School District of State funds allocable to it for the maintenance of its schools upon a constitutional basis, is also unconstitutional and invalid; that the diversion of such funds pursuant to Act No. 4 and Act No. 5 should be and is hereby permanently enjoined; that the Superintendent of the Schools of Little Rock, and the members of the Board of Directors of the Little Rock School District, and their successors, are under the continuing mandate of this District Court to effectuate the plan of integration for the public schools of Little Rock approved by this Court in *Aaron v. Cooper*, 143 F. Supp. 855 (aff'd, 8 Cir., 243 F.2d 361); and that this Court has heretofore retained jurisdiction to require the Superintendent and the School Board to take such affirmative

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person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any such student in the school which he normally would attend, for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

steps as may hereafter be directed by this Court to accomplish the integration of the schools of Little Rock in accordance with and as required by the prior orders of this Court, and the orders and decisions of the Court of Appeals for the Eighth Circuit and of the Supreme Court of the United States.

It is further adjudged that the defendants and their successors in office be and are permanently enjoined from engaging in any acts which will, directly or indirectly, impede, thwart, delay or frustrate the execution of the approved plan for the gradual integration of the schools of Little Rock, the effectuation of which has been heretofore commanded by the orders of this Court.

The motions of the defendants to dismiss the supplemental complaint, which were taken under submission by the Court, are overruled.

Dated June 18, 1959.

JOHN B. SANBORN
United States Circuit Judge

JOHN E. MILLER
United States District Judge

AXEL J. BECK
United States District Judge

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of students eligible to attend any racially integrated school, determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957, shall be useable for the purpose herein provided."

ACT 5, ARK. ACTS OF 1958 (2nd Ex. Sess.)

Approved September 12, 1958

AN ACT to Provide for the Withholding of a Portion of the State Aid Otherwise Allocable to a School District During the Period of Time Any School in Any Such District Shall Be Closed by Order of the Governor of This State; to Provide for the Payment from Any Funds So Withheld to Other Public Schools and Accredited Non-Profit Private Schools During the Period of Enrollment and Continuance of Study Therein of Any Students of Said Schools So Ordered to Be Closed by the Governor; to Authorize the State Board of Education to Adopt, and Enforce, Such Reasonable Rules and Regulations Not Inconsistent with the Provisions Hereof as it Shall Determine to Be Necessary or Desirable to Effectuate the Purposes and Intent of This Act; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Nothing in this Act contained shall be so construed as to alter, amend, or in any other manner change the method of determining the amount of State funds allocable to the public schools of a county, or of any school district therein, under the Minimum Foundation Program Law, or other applicable State aid school law, by reason of the closing of any school therein by order of the Governor of this State.

Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, the State Board of Education, acting through its Commissioner

of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such school, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order for the benefit of the said school district for maintenance and operation; plus, and also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

Section 3. Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purposes herein provided.

Section 4. For the purpose of determining the amount of State funds so to be withheld, and thereafter paid out, after the date of any such continuing closing order, the State Board of Education, or the Commissioner of Educa-

tion, may call upon the Legislative Auditor, the State Comptroller, or other State officer or employee, to assist whenever auditorial assistance or advice shall be required.

Section 5. The State Board of Education shall have the power to adopt, and enforce, such reasonable rules and regulations not inconsistent with the provisions of this Act as it shall determine to be necessary or desirable to effectuate the purposes hereof.

Section 6. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, such holding shall not affect the remainder of this Act.

Section 7. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children, that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races

in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

ACT 151 OF 1959

AN ACT to Amend Sections 2 and 3 of Act 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly; Approved September 12, 1958; and for Other Purposes.

Whereas, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life; and

Whereas, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities of such white children;

Now therefore be it Enacted by the General Assembly of the State of Arkansas:

Section 1. Section 2 of Act 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, or whenever any person

of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which any such person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any such student in the school which he normally would attend, for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education."

Section 2. Section 3 of Act 5 of the Acts of the 2nd Extraordinary Session of the General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of the students eligible to attend any racially inte-

grated school, determine to attend, and attend, in this State, any other public school, or any non profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957, shall be useable for the purposes herein provided."

Section 3. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this Act.

Section 4. It has been found, and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the limitation of attendance by students of the public schools of the State to the schools in which they are now enrolled, or may be eligible for enrollment; that such limitation of attendance results in dissatisfaction on the part of students, lack of interest, and effort in their school curricula, and a psychological impairment of the health and welfare of such students; that private, accredited schools and other public schools are more suitable for such students than their resident schools; that the state of feeling of the great majority of the people of this State is such that inability to transfer freely to accredited private

schools and other public schools will seriously impair the operation of a suitable and efficient system of schools, the psychological well-being of the students, and result in lack of discipline in the schools; that for said reasons, it is hereby declared necessary for the public peace, health, and safety that this Act shall become effective without delay. An emergency, therefore, exists, and this Act shall take effect and be in force from and after its passage

ACT 466, ARK. ACTS OF 1959

Approved March 31, 1959

AN ACT to Amend Act 5, Ark. Acts of 1958 (Ex. Sess.) Section 3, to Provide for a Refund to School Districts of Surplus Withheld Funds.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Act 5, Ark. Acts of 1958 (Ex. Sess.) Section 3 is amended to read as follows:

"Section 3. Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purpose herein provided. At the end of the school year all funds withheld as aforesaid which have not been paid over to a public or non-profit private school accredited by the State Board of Education, as provided herein shall be released and paid over to the school district involved."